## MISCELLANY

INFLUENCING THE JURY BY ASKING INCOMPETENT QUESTIONS.—On September 12, 1903, in writing of "Lugging in Incompetent Evidence," we cited two New York cases, *Cosselmon* v. *Dunfee* (172 N. Y. 507), and *Connolly* v. *Brooklyn Heights R. R.* (86 App. Div. 245; 83 N. Y. Supp. 833). In the first case the Court of Appeals condemned the practice of persistently asking questions, which were obviously incompetent, in order to get the substance of the evidence comprehended by them indirectly before the jury. In the Connolly case counsel, in arguing a question as to the admissibility of a certain letter, which was incompetent, and which was in fact excluded, stated in the presence of the jury the substance of the letter. In both cases the court said that if it had appeared that the jury had actually been influenced by the subterfuge the judgment should have been reversed.

In our former editorial we remarked:

"The practice of lugging in incompetent evidence with the purpose of getting the substantial benefit of it, is a gross breach of professional ethics. The recent cases above cited tend to show that such practice is not at all uncommon. It probably would have a wholesome moral effect if one or more judgments were reversed on this ground."

The recent decision by the Supreme Court of Wisconsin in *Barton* v. *Bruley* (October, 1903, 96 N. W 85), considers a point similar to that involved in the New York cases, and actually decides that the improper conduct of counsel was sufficient to require a new trial. It was held that where in an action for assault on a female, plaintiff's counsel was permitted, over objection, to ask defendant on cross-examination several questions as to his having made various similar assaults on other women in the past, and questions tending to show insults and indecent proposals made by the defendant to other women, which plaintiff's counsel did not expect defendant would admit, and which he had no expectation of being able to prove, such conduct was reversible error. The course of the court in reversing the judgment is to be commended; and its condemnation of the unprofessional conduct is not a whit too strong. The following is from the opinion:

"Nothing is better settled than that the commission of one assault cannot be established by commission of others, and that in a civil action for an assault such as this the defendant's character is in nowise in issue. (*Fossdahl* v. *State*, 89 Wis. 482, 62 N. W. 185; *Paulson* v. *State*, Wis., 94 N. W. 771, 774; 1 Jones, Ev., sec. 147). On the other hand, no irrelevant fact is more likely to have weight with the ordinary jury than that the accused has done similar acts on other occasions (see *Paulson* v. *State*, *supra*). Now, upon the trial under consideration, obviously this rule of law was ignored twice by the court in specific overruling of objections to such questions. This error must reverse, unless we can say with reasonable certainty that in could not have worked prejudice. Were there a single

question, although bordering on this forbidden territory, which might have been asked in good faith, and as to which the court might merely have made a mistaken ruling, we might think that the negative answer of the witness was enough to exclude the probability of prejudice; but the conduct here of the plaintiff's attorney was such as to exclude any palliation of this error of the court, or to permit us to do otherwise than condemn most distinctly that conduct. Here question after question was put by that attorney, which, of course, he knew, if answered at all, would be answered in the negative, and some of which were so vague and indefinite as to make certain that he had no expectation of proving any such fact, even if he might have hoped that the trial court would permit him to attempt it. But one inference is warranted by such conduct, and that is that the plaintiff's attorney was seeking to insidiously propagate in the minds of the jury a belief that such facts did exist, and might be proved, but for technical legal objections, and to gain benefit from the suspicion and the antagonism toward the defendant likely to arise from a belief that he was an habitual debaucher of women. Such conduct is not worthy of members of a profession devoted by their oaths, if by no other restriction, to aiding courts in promotion of justice. It never should pass without condemnation and disapproval, though not always is its effect so obvious as to make necessary reversals of judgment. Similar conduct has been characterized by this court in no uncertain terms in *Buel* v. *State* (104 Wis. 132, 135, 80 N. W. 78); *McNamara* v. *McNamara* (108 Wis. 613, 84 N. W. 901); *Goodwin* v. *State* (114 Wis. 318, 323, 90 N. W. 170). Under the rule of such cases, we cannot sustain a judgment founded upon a verdict which may well have resulted from such misconduct of counsel and erroneous ruilings of the trial court as here described."—*N. Y. Law Journal.*

Cf. *State* v. *Irwin* (Idaho), 60 L. R. A. 716, *ante*, Notes of Cases, this number.

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CHARGING JURIES IN THE FEDERAL COURTS.—The present practice of charging juries in the federal courts is illustrated in *Sebeck* v. *Plattdeutsche Volksfest Verein*, 124 Fed. 17. It was an action for alleged negligence consequent upon the explosion of a bomb at an exhibition of fireworks, given on the Society's grounds. The plaintiff lost his case after two trials in the U. S. Circuit Court, S. D. of New York, ending with the affirmance of the adverse judgment by the second U. S. C. C. of Appeals.

Plaintiff had excepted to the following expression of opinion in the charge of the court, referring to plaintiff's claim that defendant employed irresponsible and unskillful persons to discharge said fireworks. The portion of said charge in which such expression was used was as follows:

"I leave it to you to say whether the defendant employed a responsible and skillful person, or whether it employed an irresponsible and unskillful person. If the committee employed a couple of Italians about whom they knew nothing, they did not exercise the prudence which an intelligent man should have exercised. For myself, I do not believe for a moment that they

did any such thing; but that is a question of fact for you to determine, and not for me."

The Court of Appeals said:

In the federal courts an expression of opinion upon the facts is within the discretion of the judge. *Baltimore & Potomac Railway Company* v. *Fifth Baptist Church*, 137 U. S. 568, 574, 11 Sup. Ct. 185, 34 L. Ed. 784. "And it is so well settled, by a long series of decisions of this court, that the judge presiding at a trial, civil or criminal, in any court of the United States, is authorized, whenever he thinks it will assist the jury in arriving at a just conclusion, to express to them his opinion upon the questions of fact which he submits to their determination, that it is only necessary to refer to two or three recent cases in which the judge's opinion on matters of fact was quite as plainly and strongly expressed to the jury as in the case at bar. *Vicksburg, etc., Railroad* v. *Putnam*, 118 U. S. 545, 7 Sup. Ct. 1, 30 L. Ed. 257; *United States* v. *Philadelphia & Reading Railroad*, 123 U. S. 113, 8 Sup. Ct. 77, 31 L. Ed. 138; *Lovejoy* v.*United States*, 128 U. S. 171, 9 Sup. Ct. 57, 32 L. Ed. 389." *Simmons* v. *United States*, 142 U. S. 148, 155, 12 Sup. Ct. 171, 35 L. Ed. 968.—*National Corporation Reporter.*

In this connection we give the following extract from the *New York Herald* of October 16, 1903:

"Jurymen who are to decide the fate of David Lamar, Bernard Smith, his brother-in-law, 'Monk' Eastman and Joseph Brown on the charge of conspiracy with intent to assault or kill James McMahon, Lamar's coachman, filed out to the jury-room at nine o'clock last night, in Freehold, N. J., after hearing the charge of Judge Wilbur A. Heisely.

Judge Heisely, in his charge to the jury, said: 'Proofs on the part of the state in this case are entirely circumstantial. No one testified that he sat by and heard these persons confederate. Where evidence is wholly circumstantial, circumstances must be consistent with the guilt of the defendants. If you have a reasonable doubt there was a combination to assault this man the defendants should be acquitted. There is no doubt he was assaulted by some one.

'If it is true there was a conspiracy it is one of the most damnable and outrageous things that has ever occurred in this country. I don't mean to express an opinion upon it. If you believe these men did it, there is only one thing for you to do, unless law has become a farce.'

Lamar, with his eyes fastened on the Judge's face, bit his lip and shook his head with vexation.

'Gentlemen,' continued the Judge, 'if such conduct is not stopped, if juries do not convict, let us confess to the world there is no justice in our law.

'Not one guilty man should escape. The person who countenances such a criminal act is as guilty as the men who execute it.'"

The remarks of the Judge are worthy of the same adjectives that he applies to the crime. His charge was nothing more than a stump-speech for the prosecution. Such deliverances should go far with those among us who advocate a return to the English practice of a "summing-up" by the court in addition to the written instructions.